No. 17-658

In The Supreme Court of the United States

ROD BLAGOJEVICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF CURRENT AND FORMER ELECTED OFFICIALS AND OTHER CONCERNED PARTICIPANTS IN THE POLITICAL PROCESS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER IN HIS PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici include current and former members of the United States Congress and State Legislatures, former government lawyers, labor leaders, and leaders of public interest organizations. Certain of the *amici* necessarily solicit, accept, or donate campaign contributions in jurisdictions across the United States in the regular course of their political activities and wish to engage in these activities without fear that they are violating the law. *Amici* have an interest in promoting the uniform, clear, consistent, and fair application of federal extortion, bribery, and fraud laws relating to the solicitation of campaign contributions. Furthermore, *amici* have an interest in avoiding legal ambiguities that may invite arbitrary or selective enforcement.

List of Amici Curiae:

Jan Schakowsky is an incumbent member of the United States House of Representatives from Illinois.

Danny Davis is an incumbent member of the United States House of Representatives from Illinois.

Bill Foster is an incumbent member of the United States House of Representatives from Illinois.

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[1] No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. Counsel of record for the parties have received timely notice of the intent to file this *amicus* brief, and the parties have consented to the filing of this *amicus* brief.

Louis V. Gutiérrez is an incumbent member of the United States House of Representatives from Illinois.

Mike Quigley is an incumbent member of the United States House of Representatives from Illinois.

Bobby Rush is an incumbent member of the United States House of Representatives from Illinois.

Bob Barr is a former United States Attorney and a former member of the United States House of Representatives from Georgia.

William Lipinski is a former member of the United States House of Representatives from Illinois.

David Phelps is a former member of the United States House of Representatives from Illinois.

Glenn Poshard is a former member of the United States House of Representatives from Illinois and a former President of Southern Illinois University.

Emil Jones is a former President of the Illinois Senate and a former member of the Illinois House of Representatives.

Carol Ronen is a former member of the Illinois Senate.

Skip Saviano, is a former member of the Illinois House of Representatives. He is the current Village President of Elmwood Park.

Joe Sandler is a former general counsel to the Democratic National Committee and an attorney whose practice has for many years focused on election

law and related topics. Mr. Sandler has published numerous articles on campaign finance and election law, has spoken on panels on lobbying regulation and campaign finance law sponsored by bar associations and advocacy organizations, and has guest lectured on those topics at a number of universities and law schools.

Lyn Utrecht is a former Special Assistant General Counsel of the Federal Election Commission, whose practice focuses on federal and state election law and campaign finance. She has represented numerous presidential candidates, campaign committees, Members of Congress, trade associations, labor organizations and corporate entities on election law issues. She is also the co-author of various articles on election and campaign finance law.

Edward M. Smith is a former Vice-President of Laborers' International Union of North America, Midwest Region.

Nancy Shier is a Retired Manager of the Early Childhood Organization.

Harvey Silverglate is a criminal defense and civil liberties lawyer, author, and co-founder of the Massachusetts Association of Criminal Defense Lawyers.

Lawrence Suffredin is an attorney.

SUMMARY OF ARGUMENT

Amici urge the Court to grant the writ on the first question presented by Petitioner in order to address an issue of national importance. Although *amici* take no position on Mr. Blagojevich's innocence or guilt on any of the counts of conviction, they submit that this Court's guidance is needed to distinguish the lawful solicitation and donation of campaign contributions from criminal violations of federal extortion, bribery, and fraud laws. In *McCormick v. United States*, the Court acknowledged that – given the system of private political campaign financing that has existed in the United States since the nation's inception – political candidates and incumbents alike cannot realistically avoid soliciting campaign funds from the very constituents whose interests they may later advance through the support of specific legislation or other official acts. 500 U.S. 257, 272-73 (1991). As a result, *McCormick* held that extortion based on soliciting campaign contributions requires a quid pro quo in the form of an "explicit promise or undertaking" by a public official to perform or not perform an official act. However, the Court's subsequent decision in *Evans v. United States*, 504 U.S. 255 (1992), has blurred the relative clarity of *McCormick*'s holding.

Circuit courts have since struggled to determine whether and how *Evans* modified *McCormick*'s holding regarding extortion under color of official right, bribery, and fraud in the solicitation of campaign

contributions.[2] Confusion in the lower courts is problematic for law-abiding politicians and donors who wish to avoid prohibited conduct and threatens to discourage candidates and their supporters from legitimate campaign solicitation and donation activities. It is particularly important in the campaign contribution context – where contributors generally assume that the supported candidate's election will benefit the contributors' interests – that bright-line standards exist to guide prosecutors and juries to avoid selective enforcement against unpopular political candidates or donors. In addition, the circuit courts are split on whether *Evans* applies to campaign contributions, and this Court's guidance is needed to restore national uniformity to this area of the law.

Amici respectfully submit that it is important to the effective operation of the nation's political system that the Court clarify the legal standard to distinguish between the necessary, legitimate solicitation of campaign contributions, on the one hand, and unlawful extortion, bribery, and fraud, on the other. The Court's consideration of this issue is needed to guide individual political candidates and donors who wish to

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[2] Lower courts have assumed that the *McCormick* standard applies equally to extortion, bribery and honest services fraud cases, so the status of the *McCormick* precedent is relevant to all three offenses. *See, e.g.*, *United States v. Ring*, 706 F.3d 460, 466 (D.C. Cir. 2013) (assuming *McCormick* extends to honest services fraud); *United States v. Siegelman*, 640 F.3d 1159, 1171-74 (11th Cir. 2011) (per curiam) (assuming *McCormick* extends to federal funds bribery and honest services fraud).

confidently and lawfully engage in campaign financing activities.

ARGUMENT

The Hobbs Act defines extortion in relevant part as the "obtaining of property from another, with his consent . . . under color of official right." 18 U.S.C. § 1951(b)(2). In *McCormick v. United States*, this Court provided candidates, donors, and federal prosecutors with a bright-line standard for the application of extortion under color of official right to the solicitation and receipt of campaign contributions. 500 U.S. 257 (1991). The Court held that the receipt of campaign contributions by an elected official constitutes extortion under color of official right within the meaning of the Hobbs Act

> *only if* the payments are made in return for an *explicit promise or undertaking* by the official to perform or not to perform an official act. In such situations *the official asserts* that his official conduct will be controlled by the terms of the promise or undertaking.

Id. at 273 (emphases added).

One year after *McCormick*, the Court decided *Evans v. United States*, 504 U.S. 255, 258 (1992). In *Evans*, the Court held that

> passive acceptance of a benefit by a public official *is* sufficient to form the basis of a Hobbs Act violation if the official knows that he is

> being offered the payment in exchange for a specific requested exercise of his official power. The official need not take any specific action to induce the offering of the benefit.

Id. at 258 (internal quotations omitted) (emphasis in original).

Evans, which involved both cash bribes and campaign contributions, left ambiguous whether its holding extended to campaign contribution cases or was limited to other payments. In the two decades since *McCormick* and *Evans*, lower courts have struggled to identify whether and how *Evans* modified the standard established in *McCormick*. *See* Petition for a Writ of Certiorari at 20-26 (describing at length the uncertainty and split among lower courts).

I. The Court Should Grant the Writ to Resolve Two Decades of Judicial Uncertainty Regarding *McCormick* and *Evans* as to Whether Hobbs Act Extortion Under Color of Official Right, as Applied to the Campaign Contribution Solicitation Context, Requires an *Explicit* Promise or Undertaking by the Official to Perform or Not to Perform an Official Act.

A. Clarity is necessary to provide ordinary candidates and donors with fair notice of what conduct is prohibited while soliciting or donating political campaign contributions and to prevent the chilling of democratic discourse.

Ordinary participants in the political process – politicians and donors alike – are entitled to fair notice of what conduct is prohibited in the solicitation and donation of campaign contributions. For over two decades, lower courts have struggled to define precisely *McCormick*'s explicitness requirement and whether and how *Evans* modified the *McCormick* standard for campaign contributions. *See*, *e.g.*, *United States v. Ring*, 706 F.3d 460, 466 (D.C. Cir. 2013) (Tatel, J.) (*McCormick* "failed to clarify what it meant by 'explicit,' and subsequent courts have struggled to pin down the definition"); *United States v. Terry*, 707 F.3d 607, 612-13 (6th Cir. 2013) ("[C]ases debate how 'specific,' 'express' or 'explicit' a quid pro quo must be to violate the bribery, extortion and kickback laws."); *see also United States v. McGregor*, 879 F. Supp. 2d 1308,

1314, 1316-17 (M.D. Ala. 2012) ("The definition of 'explicit' remains hotly contested," and "[t]he Circuit Courts of Appeals have struggled with [the question of what *McCormick* and *Evans* require,]" generating "considerable debate."). Without further guidance from this Court, candidates and donors cannot confidently determine how to lawfully conduct their necessary fundraising activities.

Further, the uncertainty of the line between legitimate solicitation and donation of campaign funds and unlawful activity threatens to discourage law-abiding political candidates and the citizens seeking to support them from engaging in legitimate campaign financing activities. Candidates may avoid soliciting or accepting campaign contributions from potential donors who have a clear policy agenda, out of concern that the donor may expect future legislative or other official action in exchange – even though the politician does not explicitly promise to further that agenda in exchange for the funds. Conversely, campaign donors may refrain from clearly advocating for their policy interests out of fear that, if successful, they might face prosecution for having traded campaign funding for the realization of their policy goals.

B. A bright-line standard is particularly important in the political campaign contribution context to prevent selective enforcement against unpopular participants in the political process.

A bright-line standard is especially needed to prevent selective enforcement in the campaign contribution context, because it is the rule, rather than the exception, that a candidate's financial supporters make contributions with the belief that the candidate, if elected, will adopt positions that further the supporters' interests. The *McCormick* Court itself recognized that:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done.

McCormick v. United States, 500 U.S. 257, 272 (1991).

The current lack of a bright-line standard distinguishing between lawful and unlawful campaign contribution solicitation and acceptance might allow a conviction based on a politician's belief or knowledge that a contribution was made because of a *donor's* expectation that some future legislation or official act will benefit the donor, despite the *lack of any agreement* on the part of the politician to take such future

action. This relaxed articulation of the law could cast a net so wide that it might include most or all campaign fund solicitation and donation activities, "the everyday business of a legislator." To borrow this Court's language in *Kozminski v. United States*, the lack of a bright-line standard might improperly "delegate to prosecutors and juries the inherently legislative task of determining what type of" campaign financing "activities are so morally reprehensible that they should be punished as crimes." 487 U.S. 931, 949 (1988).

The threat of selective enforcement is especially acute when it comes to politicians' campaign fundraising. Candidates, and their prominent supporters, are in the public eye and often take controversial positions that may at times make them unpopular with a majority of citizens or the government. A relaxed standard that can be interpreted to encompass activity necessary to running for office or supporting a candidate risks allowing prosecutors and juries to exercise wide discretion not on the basis of an individual's culpability, but on a contest of personal or ideological popularity.

II. The Court Should Grant the Writ to Resolve the Circuit Split Over the Effect of *Evans* on *McCormick* and Restore Nationwide Uniformity to Campaign Finance Laws.

Even if the application of *McCormick* and *Evans* was clear within any given jurisdiction, a compelling interest in nationally uniform campaign finance laws

counsels that this Court grant the writ of certiorari in order to resolve a circuit split. The Courts of Appeals have divided over *Evans*' effect on *McCormick*. *E.g.*, *compare United States v. Ganim*, 510 F.3d 134, 142-44 (2d Cir. 2007) (limiting *Evans* to non-campaign contribution bribes), *with United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) (reading *Evans* as applying to campaign contributions and clarifying that "the quid pro quo of *McCormick* is satisfied by something short of a formalized and thoroughly articulated contractual arrangement (*i.e.*, merely knowing the payment was made in return for official acts is enough)"); *see also* Petition for a Writ of Certiorari at 20-26 (describing at length the uncertainty and split among lower courts).

Individual political candidates and donors, such as *amici*, often concurrently solicit and make campaign contributions in many of the nation's various jurisdictions. As a result, there is a strong interest in the uniform application of federal extortion, bribery, and fraud laws across the country. Therefore, the Court should grant the writ of certiorari in order to resolve the circuit split and restore nationwide uniformity to the law.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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